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No. 91-1440

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

SCHNABEL FOUNDATION COMPANY,
Petitioner,

v.

HARBOR INSURANCE COMPANY,
Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the District of Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Robert E. Heggestad
Casey, Scott, Canfield & Heggestad, P.C.
805 15th Street, N.W., #600
Washington, D.C. 20005
(202) 682-4082
For Respondent
Harbor Insurance Company

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals correctly ruled that the appropriate standard of appellate review for a motion for directed verdict, regardless of whether a motion for judgment notwithstanding the verdict was filed, is whether there are sufficient facts and testimony in the record to allow a reasonable jury to decide in the non-movant's favor?

II. Whether the Court of Appeals correctly ruled, after reviewing the sufficiency of the evidence, that the District Court improperly denied Harbor's motion for a directed verdict on the issue of contributory negligence?

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IN THE
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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Harbor Insurance Company ("Harbor") submits this brief in opposition to the Petition of Schnabel Foundation Company ("SFC"), for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals unanimously ordered a new trial in this action, reversing a decision of the United States District Court for the District of Columbia, which incorrectly denied Harbor's request for a directed verdict on the issue of SFC's contributory negligence.

The overriding issue presented by SFC's Petition is whether the standard of appellate review, in considering the denial of a motion for directed verdict, is somehow dependent upon the filing of a post-trial motion for Judgment N.O.V. ("J.N.O.V."). The Circuit Court ruled that one, and only one, standard was appropriate, particularly when, as in this case, a motion J.N.O.V. would have been frivolous or futile, or both. For the reasons set forth below, the Circuit Court's ruling is correct and is in accord with settled authority. By contrast, SFC's arguments elevate form over substance, and do not merit consideration by this Court.

STATEMENT OF THE CASE

Harbor, as the subrogee of its insured, OMNI Construction, Inc. ("OMNI"), brought this action on February 23, 1988 to recover amounts expended to indemnify OMNI against costs and expenses incurred as a result of SFC's negligence in designing and erecting a construction site sheeting and shoring system at 601 Pennsylvania Avenue, in the District of Columbia.

On January 31, 1989, Harbor moved for partial summary judgment on the issue of SFC's liability without fault, based upon certain provisions of the May 24, 1984 subcontract between OMNI and SFC. The District Court, however, denied Plaintiff's Motion on October 31, 1989, holding the contract language ambiguous.

The case, thereafter, was tried before a jury, starting on June 21, 1990, principally on a theory of professional negligence. Defendant presented three expert witnesses during its case in chief. Its principal expert, Edward Cording, was called to establish that SFC's use of a "soldier beam and wood lagging" system and its overall

performance were consistent with the reasonable standard of care employed by other subcontractors at "comparable" building sites. Counsel for Harbor attempted to cross-examine this witness to ascertain whether he had any actual knowledge of the sites which he had suggested were "comparable" to the 601 site, in order to determine the witness' credibility as an expert, and the credibility of his testimony that SFC's performance was comparable. The Court, however, cut off this line of inquiry, thereby frustrating Harbor's attempt to discover whether Mr. Cording had any actual knowledge of the sites referred to in his testimony, and presented to the jury, as the basis for the opinion of an "expert."

At the conclusion of all the evidence, Harbor moved for a directed verdict, on the ground that SFC had failed to present any evidence establishing its theory of contributory negligence. This motion was denied on June 29, 1990. The jury subsequently returned a verdict in favor of SFC on July 2, 1990.[1]

1/ On July 12, 1990, Harbor requested an extension of time to file a motion J.N.O.V., which the court granted the following day, allowing Harbor to file its motion within 10 days from the time the trial transcript was prepared. The transcript was completed and filed on August 2, but due to the late hour at which Harbor was informed of the filing, Harbor was unable to procure the transcript until the following day, from which time Harbor counted the days within which to file its motion for J.N.O.V., which was filed on August 17. The district judge, however, counting from August 2, ruled that the motion was untimely filed and denied it. As Harbor had already filed a notice of appeal, which had been held in abeyance during the proceedings regarding the motion for J.N.O.V., and serious questions remained as to whether a motion for J.N.O.V. was the proper procedure under which the court might reconsider a motion for partial directed verdict, it elected to avoid further delay and to proceed with the merits on appeal.

Harbor thereafter appealed from the judgment, contending that the District Court erred in denying its motion for summary judgment based on SFC's strict contractual liability, in truncating its cross-examination of SFC's principle expert witness, and in denying its motion for directed verdict on the issue of contributory negligence.

The Court of Appeals reviewed the record[2] and unanimously agreed that the District Court erred in denying Harbor's motion for a directed verdict on the issue of contributory negligence. In so holding, it stated that "no reasonable jury... could have found that either Westminster or OMNI... was contributorily negligent." [App. D. at 8].[3]

SUMMARY OF THE ARGUMENT

SFC's position, although stated from several different perspectives, is relatively simple and straightforward. Essentially, SFC contends that in the absence of a post-trial motion J.N.O.V., a reviewing Court, passing upon the propriety of a motion for directed verdict, made at the close of all the evidence, may grant a new trial only if the record discloses a complete lack of evidence to support the jury's verdict. SFC would thus have the standard of appellate review dependent upon the iteration of a post-

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2/ Although SFC repeatedly states that the Court of Appeals reviewed only partial excerpts of the record, it fails to support its assertions. Indeed, the last paragraph of the Order from the Court of Appeals states, "...the *record* is devoid of evidence...." Indeed, as this Court is well aware, the Circuit Courts always have access to the full trial record.

3/ The Circuit Court also held that the District Court abused its discretion in limiting cross-examination of SFC's primary expert witness, but did not reach the question of whether this error was prejudicial, given its decision regarding the denial of Harbor's Motion for a Directed Verdict.

judgment motion J.N.O.V. -- in cases with such a motion, the appellate court would be entitled to weigh the sufficiency of the evidence, in cases without such a motion, the "plain error" or total lack of evidence standard would apply. SFC suggests in its Petition that to do otherwise would violate Rule 50(b), Fed.R.Civ.P. and the Seventh Amendment's guaranty of trials by jury.

SFC's argument, however, was rejected by the District of Columbia Circuit en banc, and should be rejected by this Court, because the underlying decision comports fully with this Court's precedents and does not impugn any constitutional guarantee. By contrast, SFC's proposed rule would shackle appellate review into a pointless and inflexible dichotomy.

This Court, in *Celotex v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), clarified the relationship between motions for summary judgment and for directed verdict and, by analogy, for Judgment N.O.V.[4] Under the Court's decisions, there is no longer any room for doubt that all such motions present the same issue, and are subject to the same standard, being differentiated only by the stage of the proceedings at which they are interposed. Every one of those motions, then, presents the Court with the question of whether the admissible evidence, as shown to the Court, would be sufficient to support a jury verdict in favor of the non-movant.

When a District Court rules on a motion for directed verdict, presented at the close of the evidence, it necessarily passes upon the sufficiency of the non-movant's evidence in its entirety. No new evidence is adduced in the

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4/ *See* R. 50, Fed.R.Civ.P.; and *see generally* 5A Moore's Federal Practice 50.07[2] (1989 and 1991 Supp.).

interregnum between such a motion and a motion J.N.O.V. Consequently, there is no logical rationale for tying the standard of review to a perfunctory motion J.N.O.V., and the Circuit Court in this case so ruled, holding that the standard of appellate review in all cases is identical to the standard applied by the District Court, that is, whether there was sufficient evidence to support a jury verdict in the non-movant's favor. The salient point, then, is there is nothing intrinsic to a motion J.N.O.V. which, in itself, should alter the standard of review. Indeed, in this case, as the Circuit Court pointedly observed, Harbor could not have been granted J.N.O.V., in any event, because a jury question was presented with respect to SFC's negligence and Harbor could not in good faith move for a directed verdict on it, which would have been a prerequisite for J.N.O.V. Such a procedural road block, however, should not deny Harbor full appellate review of the denial of its motion for directed verdict on SFC's defense of contributory negligence.

Moreover, the unitary standard adopted by the Circuit Court does not invade the province of the jury or correct a "non-error" as SFC contends. The right to a jury trial, as guaranteed by the Seventh Amendment, does not necessarily guarantee a jury resolution of every case within its ambit. The trial court obviously may dispose of a case summarily at different junctures without offending the Constitution, and there is no valid reason why an appellate court should not be able to conclude that a trial judge erred in allowing a case to go the jury, based on the same standard that the trial judge should have applied. In this instance, the judge's error is in allowing the case to go to the jury in the first place, and that error exists whether a motion J.N.O.V. is filed and denied, or never filed at all. At most, the filing of a motion J.N.O.V. allows the trial judge to correct his error,

but the failure to provide that opportunity should not emasculate subsequent appellate review, as SFC urges.

In addition to its principal argument, SFC contends that the Circuit Court failed to consider the entire record in reversing the District Court. This assertion, however, rests on nothing more than speculation and innuendo, and is nowhere established by the record. Moreover, the evidence which SFC says the Court did not review is set forth repeatedly in its original and rehearing briefs, and was explained in oral argument.

In short, SFC had ample opportunity to brief the Circuit Court on the facts and the law, but simply failed to convince it that its evidence on contributory negligence was sufficient to avoid summary adjudication. The Circuit Court's decision in no way undermines constitutional guarantees. Instead it comports with this Court's procedural pronouncements, designed to "secure the just, speedy, and inexpensive determination of every action." Rule 1, Fed.R.Civ.P.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY CONCLUDED THAT THE STANDARD FOR APPELLATE REVIEW OF A MOTION FOR DIRECTED VERDICT IS WHETHER THERE WAS SUFFICIENT EVIDENCE TO ALLOW THE ISSUE TO GO TO THE JURY, REGARDLESS OF WHETHER A MOTION J.N.O.V. WAS FILED.

SFC persistently characterizes the decision of the Circuit Court to review the sufficiency of the evidence as erroneous and contrary to the rule applied in a majority of

the circuits, but this assertion is not borne out by an analysis of the cases cited in SFC's Brief.

As the Circuit Court stated, regardless of whether a motion J.N.O.V. is made, the proper standard of review for a directed verdict motion is the same in both the trial court and on appeal -- whether there is sufficient evidence to present a jury question -- and to require the appellate court to only look to see whether there was absolutely no evidence to go to the jury is against the vast weight of authority.[5] Slip Opinion ("Slip Op.") at 10-11, *citing* 9 *C. Wright & A. Miller, Federal Practice and Procedure,* 2524 at 541-543 and cases cited nn. 30-31 (1971 and Supp. 1991).

A review of appellate case law reveals that courts generally will review the sufficiency of the evidence when ruling on the propriety of a decision denying a motion for directed verdict. *See, e.g. Santiago Hodge v. Parke Davis & Co.*, 909 F.2d 628, 634 (1st Cir. 1990); *Eldred v. Town of Barton, New York,* 505 F.2d 186, 188 (2d Cir. 1974); *Bielevicz v. Dubinon,* 915 F.2d 845, 849 (3rd Cir. 1990); *Gairola v.*

5/ The rule was well stated in *Boeing Company v. Shipman,* 411 F.2d 365 (5th Cir. 1969) after the court had reviewed numerous different formulations of the proper standard: "On motions for directed verdict and for judgment notwithstanding the verdict the court should consider all of the evidence - not just that evidence which supports the non-mover's case - but in the light most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper... A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and Judgment N.O.V. should not be directed by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question." *Id.* at 374-375.

Com. of Va. Dept. of General Services, 753 F.2d 1281, 1285 (4th Cir. 1985); *Smith v. Trans-World Drilling Co.*, 772 F.2d 157, 160 (5th Cir. 1985); *Danielson v. City of Lorain*, 938 F.2d 681, 683 (6th Cir. 1991); *Lenard v. Argento*, 699 F.2d 874, 888 (7th Cir. 1983), cert. denied 464 U.S. 815, 104 S.Ct. 64 (1983); *Chicago Rock Island and Pacific Railroad Co. v. Breckenridge,* 333 F.2d 990, 996 (8th Cir. 1964); *Nesbit v. McNeil,* 996 F.2d 380, 382 (9th Cir. 1990); *Marshall v. El Paso Natural Gas Co.,* 874 F.2d 1373, 1384-85 (10th Cir. 1989); *Jackson v. Seaboard Coast Line R. Co.,* 678 F.2d 992, 1021 (11th Cir. 1982).

More specifically, five circuits in addition to the District of Columbia Circuit have now decided that an appellate court should review the sufficiency of the evidence when examining a motion for directed verdict, regardless of whether a motion J.N.O.V. was filed. *See*, e.g. *Smith v. Trans-World Drilling Co., supra*; *Lenard v. Argento, supra*; *Chicago Rock Island and Pacific Railroad Co. v. Breckenridge supra*; *Marshall v. El Paso Natural Gas Co., supra*; *Jackson v. Seaboard Coast Line R. Co., supra.*

By contrast, the majority of cases cited by SFC in support of its "plain error" standard of review involve situations inapposite to the present case. For example, in *Quaker City Gearworks, Inc. v. Skil Corp.,* 747 F.2d 1446, 1453 (1984), (SFC Petition "SFC Pet." at 12), the court held that a party should have filed a motion J.N.O.V. instead of a motion for judgment in its favor under Rule 50(b), Fed.R.Civ.P., in order to challenge the sufficiency of the evidence supporting jury responses to special interrogatories. Nowhere, however, does the case state that a motion for directed verdict is insufficient to challenge the sufficiency of the evidence on appeal.

In general, the cases cited by SFC can be distinguished and placed into four groups, although some belong to more than one:

1) where the party seeking reversal had not filed a motion for directed verdict at the close of all the evidence:

-- *Porter v. Eckart*, 465 F.2d 1307, 1309 (5th Cir. 1972) (SFC Pet. at 13);[6]

-- *Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814, 817 (2d Cir. 1970) (SFC Pet. at 13);

-- *Hilord Chemical Corporation v. Ricoh Electronics, Inc.*, 875 F.2d 32, 38 (2d Cir. 1989) (SFC Pet. at 11);

-- *Continental Cas. Co. v. Howard*, 775 F.2d 876, 883 (7th Cir. 1985), *cert. denied* 475 U.S. 1122 (1986) (appellee had failed to raise issue of jury instruction at any point, so appellate court, which raised issue itself, was powerless to act) (SFC Pet. at 11);

-- *Wells Real Estate v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 810 (1st Cir. 1988), *cert. denied* 488 U.S. 955 (1988) (Sch. Pet. at 11);[7]

6/ The court reversed for a new trial, stating that "[t]o rule that an unintended flaw in procedure bars a deserving litigant from any relief is unwarranted triumph of form over substance, the kind of triumph which, commonplace enough prior to our more enlightened days, we strive now to avoid whenever possible." *Id.* at 817.

7/ The court noted that "a federal appellate court may not reverse for insufficiency of the evidence in the absence of an unwaived motion for directed verdict," citing *La Forest v. Autoridad de las Fuentes Fluviales de Puerto Rico*, 536 F.2d 443, 445 (1st Cir. 1976), implying that an appellate

2) where appellants were seeking directed verdicts in their favor, when, as the Circuit Court noted in the present case, the only relief available under Rule 50, Fed.R.Civ.P. was a new trial. Slip Op. at 10, *citing Johnson v. New York, N.H. & H.R.R.*, 344 U.S. 48 (1952):

-- *Woods v. National Life and Accident Insurance Company*, 347 F.2d 760, 769 (3d Cir. 1965) (failure to file a motion J.N.O.V. in the trial court "precludes an examination of the record by that court or this court for the purpose of ascertaining whether that party was entitled to a directed verdict." (emphasis added)) (SFC Pet. at 11).

-- *Charles Jacquin et Cie v. Distileria Serralles,* 921 F.2d 467, 475 (3d Cir. 1990) (SFC Pet. at 11);

3) where there was no discussion of whether appellants had moved for a directed verdict:

-- *Edwards v. Jewish Hospital of St. Louis,* 855 F.2d 1345, 1353 (8th Cir. 1988) (alleged error involved special interrogatory) (SFC Pet. at 11);

-- *Dixon v. Montgomery Ward*, 783 F.2d 55 (6th Cir. 1986) (SFC Pet. at 11);

-- *Borger v. Yamaha Intern. Corp.,* 625 F.2d 390, 394-5 (2d Cir. 1980) (SFC Pet. at 11);

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court can reverse for insufficiency of evidence when an unwaived directed verdict motion (one raised at the close of all the evidence) has been made. *Id.*

4) where rulings were based on Supreme Court decisions which cannot be read to support the rulings, most notably *Johnson v. New York, N.H. & H.R.R. Co.*, *supra*, (where no motion J.N.O.V. filed, new trial was only relief an appellate court could grant when reviewing a motion for directed verdict) and *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 218 (1947) (appellate court cannot direct a verdict for appellant who fails to timely move for J.N.O.V.):

-- *Karjala v. Johns-Manville Products Corp.*, 523 F.2d 155, 157 (8th Cir. 1975) (relying on *Johnson* and *Cone, supra*, *Tri-State Insurance v. United States,* 340 F.2d 542, 546 (8th Cir. 1965), which also relies on *Johnson*, and 5A J. Moore, Federal Practice, 50.05 (1974 ed.), which states that "courts have been consistent in holding that the appellate court cannot review the sufficiency of the evidence in absence of an unwaived motion for a directed verdict." *Id.* at 50-45) (SFC Pet. at 10);

-- *Ward v. Banquet Foods Corporation*, 488 F.2d 141, 142, n. 1 (8th Cir. 1974) (relying on *Johnson*) (SFC Pet. at 12);

Moreover, none of these cases cited by SFC address the specific issue resolved by the Circuit Court -- whether the failure to file a futile or unwarranted motion J.N.O.V. alters the standard of appellate review concerning a directed verdict motion addressing an affirmative defense.

II. THE MERITS OF THE ISSUE SUPPORT EXAMINATION BY THE APPELLATE COURT OF THE SUFFICIENCY OF THE EVIDENCE WHEN RULING ON A MOTION FOR DIRECTED VERDICT, REGARDLESS OF WHETHER A MOTION J.N.O.V. WAS FILED.

SFC claims, without authority, that Rule 50(b), Fed.R.Civ.P. requires a motion for J.N.O.V. to be filed in order to preserve a directed verdict motion for appeal. This is particularly strange given the long line of decisions cited by SFC in its Petition in which this Court approved appellate decisions to review motions for directed verdict when no motion J.N.O.V. had been filed. *See, e.g. Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952); *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948); *Galloway v. United States*, 319 U.S. 372 (1943); *Berry v. United States*, 312 U.S. 450 (1941); *Baltimore & C. Line v. Redman*, 295 U.S. 654 (1935). *See also*, 5A Moore's Federal Practice 50.12 at n. 18 (1989 and 1991 Supp.). The cases cited by SFC, rather, merely hold that "the sufficiency of the evidence is not reviewable on appeal unless a motion for directed verdict was made in the trial court." *Thronson v. Meisels*, 800 F.2d 136, 139, *citing* 9 C. Wright & A. Miller, *Federal Practice and Procedure* 2536 at 593 (1971 and 1986 Supp.); accord, *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir. 1978). Moreover, "for purposes of preserving the right to challenge the sufficiency of the evidence on appeal a motion at the close of [the plaintiffs'] case will not do unless it is renewed at the close of the evidence..." which was done in the present case, thus preserving the issue for appeal. *Thronson, supra* at 139.

SFC then apparently wishes to apply the standard of review for a motion for new trial, as set out in *Columbia Plaza Corp. v. Security Nat. Bank*, 676 F.2d 780, 788 (D.C. Cir. 1982). This standard is completely irrelevant, because a motion for new trial has absolutely nothing to do with a motion for directed verdict. A "motion for directed verdict tests the legal sufficiency of the evidence to take the case to the jury; and thus raises a question of law," while a motion for new trial raises any number of factual questions which the court may rule on at its discretion, including the actual weight of the evidence, thus requiring a higher standard of review. 5A Moore's Federal Practice 50.03[2] at 50-36 (1989 and 1991 Supp.).[8]

SFC attempts to twist the holding of *Johnson v. New York, N.H. & H.R.R.*, *supra*, to "necessarily" require a motion J.N.O.V. in order to review the sufficiency of the evidence pursuant to a motion for directed verdict, even when, as in the present case, a motion J.N.O.V. could never have been granted by the trial court. This is not even implied by *Johnson*, which, as noted above, merely holds that where a party has not moved judgment N.O.V., an appellate court cannot direct a judgment in its favor, but can reverse for a new trial. *Id.* at 54.

Finally, SFC contends that the appellate court could only review the issue of contributory negligence on a

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8/ "Courts have at times mistakenly equated the standards used for making rulings on motions for directed verdicts and motions for new trial. The standards differ, however... and the court has the discretion to grant a new trial on the ground that the verdict is against the weight of the evidence even when substantial evidence exists that would prevent a directed verdict. The court also has the discretion to grant a motion for a new trial on the ground that the verdict is against the weight of the evidence, when the evidence is so insufficient that a motion for directed verdict would have been granted if made." *Id.*

"plain error" standard, because the issue had not been brought before the trial court. This is absurd. The motion for directed verdict plainly brought the issue to the trial court's attention:

> For the reasons that I just stated, I didn't believe there has been any evidence in this record on the contributory negligence of either Westminster, or its agent Leo A. Daly, or of OMNI. Mr. Cording's testimony is that the decision of Westminster to place the building at the location it did, given the conditions of the site and what was known about the Sears Building, was in fact a reasonable decision, and that essentially all of the actions that were taken prior to the settlement and up until the November settlement by all the people involved, including Leo A. Daly, there were reasonable decisions made.
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>
> As far as OMNI goes, I have already discussed OMNI's role with respect to the excavation and the dewatering. But aside from that, to show contributory negligence, they also have to show proximate cause. As I understand the Defendant's theory in this case, it is that there is absolutely no way that you can show that any single one activity caused settlement. Given that position, I don't believe that they can prove proximate causation as part of an element of contributory negligence for OMNI.
>
> For those reasons, I would request a directed verdict that neither Westminster or its agents Leo A. Daly or OMNI were contributorily negligent. Thank you, Your Honor... Trial Transcript ("Tr. Trans.") at 832-34.

The Circuit Court's decision to examine the sufficiency of the evidence when reviewing a motion for directed verdict, regardless of whether a motion for J.N.O.V. was filed, comports with its responsibility to apply the same standard of review as the trial court. As the appellate court noted, "post trial motions... are nowhere made a condition of securing effective appellate review." Slip Op. at 11.

In complex litigation such as this, some issues might be decidable by the trial court as a matter of law and others might not be. Harbor moved only for a partial directed verdict, on the issue of contributory negligence, because it believed that sufficient factual questions had been presented regarding the issue of negligence to allow it to go to the jury. SFC, however, would require the court's and litigants' resources to be wasted on J.N.O.V. motions which, at least in this case, could not possibly have allowed the court to return a judgment in Harbor's favor. Indeed, judicial resources would never be saved by such a rule. If the moving party prevailed, at best the trial court could order a new trial, as the appellate court granted in this case. If the motion was denied, an appeal, like the one required by the circumstances of this case, would simply follow, and as the appellate court noted, parties already have every incentive to avoid an appeal and its cost by filing a motion J.N.O.V. where possible. Slip Op. at 11, n. 3. As Judge, later Chief Justice, Burger stated in his dissent in *Jackson v Wilson Trucking Corp.*, 243 F.2d 212 (D.C. Cir. 1957):

> [a] narrow interpretation and application of the Rules through the imposition of "implied" conditions and limitations harks back to the era of common law pleading and procedures where "judges [were] imprisoned in technicalities of their own devising***" This is foreign to the modern trend, culminating in the Rules, to do

> away with rigid concepts and artificial labels." *Id.* at 217, citing Frankfurter, J., dissenting in *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 62, 73 S.Ct. 125, 133, 97 L.Ed. 77 (1952).

The appellate court correctly established the standard of review for a motion for directed verdict in this case, in accordance with the vast weight of authority, and SFC's request for a useless and more rigid standard should be denied review by this court.

III. NO GENUINE CONSTITUTIONAL ISSUES HAVE BEEN RAISED BY SFC'S PETITION

SFC persistently and futilely attempts to characterize the appellate court's decision to review the sufficiency of the evidence as "invading" the province of the jury, thus enabling it to invoke the Seventh Amendment and claim that the appellate court has an obligation to conduct an independent examination of the entire record, because a constitutional right is at stake. Unfortunately for SFC, it is well-settled that the grant of a motion for directed verdict is not unconstitutional. *Galloway v. United States*, 319 U.S. 372, 396 (1943). Nor are the standards of proof required by courts for submission of evidence to the jury an invasion of the right to a jury trial.

> Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonable possible inferences favoring the party whose case is attacked. The mere difference in labels used to describe this standard [of review]... on

> motion for a directed verdict, cannot amount to a departure from "the rules of the common law" which the [7th] Amendment requires to be followed. If there is abuse in this respect, the obvious remedy is by correction on appellate review." *Id.* at 395.

Moreover, the cases cited by SFC, requiring independent review of the entire record are inapposite, since they all concern protection of First Amendment rights. Accordingly, the federal right to a jury trial was not an issue before the trial and appellate courts, and *Northern Pacific Railroad v. North Dakota,* 236 U.S. 585 (1915), has no bearing on this case.[9]

In any event, SFC presents no evidence that the appellate court did not independently review the entire record. SFC cites a portion of the opinion where the Circuit Court states that it has "reviewed in detail all of the evidence... that Schnabel cited in its brief or at oral argument," but this does not establish that the Court did not review other portions of the record. Indeed, a review of the court's opinion reveals several references to their examination of the record:

-- "[w]e are entitled to consider all uncontradicted evidence offered by the moving party, as well as all evidence introduced by the non-moving party." Slip Op. at 9;

9/ The appellate cases cited by SFC also provide no support for their argument. *Carter v. Duncan-Huggins,* 727 F.2d 1225, 1227 (D.C. Cir. 1984) requires the reviewing court to examine "all the evidence offered." The appellate court did conduct such an examination, and SFC does not claim that they did otherwise. In *Boutros v. Riggs Nat. Bank, D.C.*, 655 F.2d 1257, 1261 (D.C. Cir. 1981) the court stated that it examined the entire record when reviewing a motion J.N.O.V., but it indicated no obligation to do so.

-- "[A]pplying the traditional 'reasonable jury' standard, we do not think the record supports a contributory negligence finding." *Id.* at 11;

-- "[T]he record indicates that OMNI's unvarying practice was to rely completely on its subcontractor's expertise regarding sheeting and shoring systems." *Id.* at 13.

-- "In sum, the record is devoid of evidence sufficient to warrant a finding of contributory negligence by a reasonable jury." *Id.* at 15.

SFC complains that it was not allowed to present additional evidence in its favor because its Petition for Rehearing was denied by the appellate court. SFC Pet. at 23-24. A rehearing, however, is permitted only at the discretion of the appellate court. In this instance, the opinion had the approval of the entire court, rendering a rehearing unnecessary, and SFC had already argued as to the sufficiency of the evidence standard. *See* Brief for Appellee SFC at 17. Moreover, the evidence SFC submitted in its Petition for Rehearing was not new, and did not rise to the level of sufficiency needed to allow reasonable jurors to decide in its favor on the issue of contributory negligence.

Most of the issues which SFC raised in its Petition for Rehearing - OMNI's duty of care, excavation and OMNI's control over it, dewatering and OMNI's control over it -- had already been raised before the appellate court in briefs and at oral argument. Initial Brief for Harbor at 16-19; Brief for Schnabel at 19-20. Transcript of Oral Argument at 10-12, 23-32. Of those issues which were not raised by SFC on appeal, regarding OMNI's failure to obtain plans of the Sears Building renovation, SFC's own expert, Mr. Wlaschin testified that OMNI and Westminster had

attempted to obtain plans, but that their requests were denied by Sears until after the settlement had occurred. Tr. Trans. at 200. Regarding the testimony of SFC's expert, Mr. Neubauer, about Leo A. Daly's negligence, relating to the architect's alleged failure to provide input, involvement, and supervision, on cross-examination Mr. Neubauer admitted that he had no actual knowledge of such failure, or any basis for his opinion. Tr. Trans. at 501.

Even if SFC had taken its opportunity to present at oral argument or in its Brief whatever additional evidence it now believes to be sufficient, which it did not deem important at the time, it is clearly insufficient to allow a reasonable juror to decide in their favor. SFC's attempt to create a constitutional issue out of whole cloth is similarly without merit, and should be denied review by this Court.

IV. SFC'S ARGUMENT THAT A GENERAL JURY VERDICT WAS FOUND IN ITS FAVOR REGARDLESS OF THE ISSUE OF CONTRIBUTORY NEGLIGENCE IS CONTRADICTED BY THE TRIAL COURT'S INSTRUCTIONS TO THE JURY.

Aside from the fact that SFC never raised this issue in its Brief or at oral argument on appeal, SFC's allegation that the jury would necessarily have had to have found in its favor irrespective of the issue of contributory negligence is simply unsupported by the record. The trial court instructed the jury that Harbor had to prove that OMNI relied on SFC's warranties in order to find that it was

liable on the warranty count.[10] If the jury believed that OMNI had a duty to directly control and oversee SFC and the other subcontractors and could not and did not rely on their expertise, as SFC alleged in order to show OMNI's contributory negligence, then they would have found that OMNI did not rely on SFC's warranties, making it possible for the jury to have found SFC negligent but still not liable for breach of warranty. As such, it is still impossible to determine the basis for the jury's verdict, and a new trial remains the appropriate relief.

CONCLUSION

For the foregoing reasons, SFC's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Robert E. Heggestad
Casey, Scott, Canfield &
Heggestad, P.C.
805 15th Street, N.W., #600
Washington, D.C. 20005
(202) 682-4082
For Respondent
Harbor Insurance Company

Dated: April 10, 1992

10/ "In this case OMNI claims that Schnabel Foundation breached a warranty clause in the contract. Under this clause in the contract, Schnabel Foundation promised that the work it performed would be of good quality and free from faults and defects. If you find that Schnabel Foundation made this promise, that it was relied on by OMNI, that Schnabel Foundation failed to perform work of good quality, and this failure caused the damage to the Sears Building, then you may hold the defendant liable for breach of contract." Tr. Trans. at 894-95 (emphasis added).